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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

ROOTS READY MADE GARMENTS CO.
W.L.L.,

Plaintiff,

v.

THE GAP, INC., a/k/a, GAP, INC., GAP
INTERNATIONAL SALES, INC., BANANA
REPUBLIC, LLC, AND OLD NAVY, LLC,

Defendants.

Case No: C 07 3363 CRB

PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS'
MOTION FOR A PROTECTIVE ORDER

Date: October 19, 2007

Time: 10:00 a.m.

Place: Dept. 8

Judge: Hon. Charles R. Breyer

NY: 560074-2

1 Plaintiff Roots Ready Made Garments Co. W.L.L. (“Roots”) respectfully submits
2 this Memorandum of Points and Authorities in opposition to the motion for a protective order
3 (docket # 48) filed by Defendants The Gap, Inc., Gap International Sales, Inc., Banana
4 Republic, LLC, and Old Navy, LLC (collectively, “Gap”).

5 **PRELIMINARY STATEMENT**

6 Discovery in this action has been ongoing for over a month. Both parties have
7 made substantial document productions; Roots has participated in two depositions of Gap
8 witnesses; Roots has served its initial disclosures; and Gap has served its first set of document
9 requests, interrogatories, and requests for admissions. On September 5, 2007, Roots noticed the
10 deposition of a third-party, Amin El Sokary for September 12, 2007. Although Gap was already
11 prepared to take Mr. El Sokary’s deposition on that date in a related action, Gap filed a motion
12 for a protective order, asking that Roots’ examination of Mr. El Sokary be “rescheduled for
13 another time when mutually convenient for the parties.” (Gap Mot. at 2.) Gap has no legitimate
14 basis to seek a protective order.

15 *First*, this Court’s order denying Roots’ motion to consolidate this action with
16 the closely-related Gabana litigation does not in any way preclude Roots from noticing third-
17 party depositions of Gabana witnesses, such as Mr. El Sokary, with the cooperation of those
18 witnesses.

19 *Second*, Gap received “reasonable notice” of the deposition. Defendants admit
20 that they were informed on September 4 of Roots’ intent to depose Mr. El Sokary on September
21 12, and that Gap’s counsel received a formal deposition notice from Roots the following day.
22 Defendants cannot credibly claim that September 12 is an inconvenient date, or that they lacked
23 sufficient time to prepare for the deposition, since Gap is scheduled to depose Mr. El Sokary’s
24 on September 12 in the Gabana litigation.

25 *Third*, Roots’ deposition notice is not premature. Through a process initiated by
26 Gap over a month ago, the parties have already conferred concerning discovery-related issues as
27 required by Rule 26(f). Gap acknowledged as much when it served its own discovery requests
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1 on Roots more than two weeks ago. Roots is similarly entitled to pursue discovery at this time
2 by noticing a third-party deposition.

3 For these reasons, the motion for a protective order should be denied.

4 **PROCEDURAL BACKGROUND**

5 Plaintiff Roots filed this action against Gap on June 26, 2007 (“Roots Action”).
6 On July 7, 2007, this Court determined that the Roots Action was related to another lawsuit filed
7 by Plaintiff Gabana against the same defendants, and arising out of the same underlying
8 business transactions (“Gabana Action”).

9 On July 25, 2007, Roots filed a motion to consolidate the Roots Action and the
10 Gabana Action for purposes of discovery and trial. (Docket No. 18.) While that motion was
11 pending, the Court ordered that Roots was permitted to participate in a deposition of a Gap
12 witness, Jim Bell, that was scheduled to occur in the Gabana litigation on August 10, 2007.
13 (Docket No. 25.) In advance of the deposition, Roots and Gap each made initial document
14 productions, amounting to some 45,000 pages. (Haney Decl. ¶ 8.) On August 17, with Gap’s
15 consent, Roots participated in a deposition of a second Gap witnesses, Julie Kanberg. (Haney
16 Decl. ¶ 8.) On July 31, 2007, Gap asked Roots to propose a schedule for discovery in the Roots
17 Action. (Haney Decl. ¶ 4, Ex. 1.) Roots responded with a proposed schedule on August 8,
18 2007. (Haney Decl. ¶ 5, Ex. 2.) Gap did not respond with a counterproposal. (Haney Decl. ¶
19 5.) On August 17, pursuant to its proposed discovery rule, Roots served Gap with its initial
20 document disclosures. (Haney Decl. ¶ 6, Ex. 3)

21 On August 23, 2007, Gap served its initial set of document requests,
22 interrogatories, and requests for admissions in the Roots Action. (Haney Decl. ¶ 9, Exs. 4, 5, 6.)

23 On August 24, 2007, the Court denied the motion for consolidation. (Docket No.
24 42.) The Court declined to order Roots’ participation in depositions of foreign witnesses
25 scheduled to occur in the Gabana Action during the week of September 10 in Paris, France.
26 (Haney Decl. ¶ 10.) However, the Court’s order did not preclude Roots from noticing the
27 depositions of Gabana witnesses with the cooperation of those witnesses. (Haney Decl. ¶ 10.)

Gap is scheduled to take the depositions of Gabana witnesses, including Mr. El Sokary, in the Gabana Action during the week of September 10 in Paris, France. (Haney Decl. ¶ 11.) Over the Labor Day weekend, Roots negotiated an agreement with Gabana's counsel pursuant to which Roots would produce its former CEO, Ashraf Abu Issa, in Paris for a deposition in the Gabana Action on September 10, 2007, and Gabana would make one of its witnesses, Amin El Sokary, available for a deposition in the Roots Action on September 12. (Haney Decl. ¶ 12.)

On September 4, 2007, Gabana's counsel informed Gap's counsel of this arrangement. (Haney Decl. ¶ 13, Ex. 7.) The next day, Gap's counsel objected to Roots taking Mr. El Sokary's deposition, purportedly based on the Court's order denying consolidation. (Haney Decl. ¶ 14, Ex. 8.) Roots' counsel responded that the Court made no ruling precluding Roots from noticing a third-party deposition of a Gabana witness now that discovery had commenced in the Roots' litigation. (Haney Decl. ¶ 15, Ex. 9.) Roots also sent Gap's counsel a notice of Mr. El Sokary's deposition by electronic mail. (Haney Decl. ¶ 16, Ex. 10.)

On September 6, Gabana's counsel acknowledged receipt of the deposition notice, but asserted that the notice was premature because the parties had not yet "conferred [concerning discovery] as required by Rule 26(f)" (Haney Decl. ¶ 17, Ex. 11.) By reply email sent later that day, Roots' counsel explained that Roots had already discharged its obligation to "meet and confer" regarding discovery by sending a proposed discovery schedule to which Gap never responded. Moreover, Gap already had served written discovery requests two weeks earlier. (Haney Decl. ¶ 18, Ex. 12.)

On September 7, Gap's counsel served objections to the notice of deposition, and filed this motion for a protective order. (Docket No. 48.)

ARGUMENT

Gap has no legitimate basis for seeking a protective order in this case. Gap requests that "the deposition of Amin El Sokary . . . be postponed in time to a mutually agreeable date on which all counsel is available." (Gap Mot. at 1.) However, Gap offers no

1 explanation for why September 12 is an inconvenient date for this deposition. In fact,
2 September 12 is the most convenient date for all parties, since Gap is already scheduled to
3 depose Mr. El Sokary on that date in the Gabana Action, concerning the very same business
4 transactions at issue in the Roots Action. Gap's motion is simply an attempt to impose
5 additional costs on Roots, and to delay the progress of the Roots Action by forcing Roots to
6 arrange another date when all the parties can appear in Paris — a process Gap claims took
7 “nearly a year to schedule” the first time.

8 Gap's assertion that Roots' deposition notice contravenes this Court's order
9 denying Roots' motion to consolidate the Roots Action and the Gabana Action, (Gap Mot. at 4),
10 is simply incorrect. The Court declined to order Gabana to produce its witnesses for depositions
11 in the Roots' Action. However, that ruling in no way precludes Roots from noticing third-party
12 depositions of Gabana's witnesses with Gabana's cooperation.

13 Gap's argument that the deposition notice is somehow “premature” is likewise
14 wrong. Gap asserts that “discovery may not commence in an action prior to the Rule 26(f)
15 conference of the parties.” (Gap. Mot. at 3.) This is true, but irrelevant. In its motion papers,
16 Gap inexplicably fails to disclose that Roots already discharged its obligations under Rule 26.
17 On August 8, Roots proposed a discovery schedule for this action to which Gap never
18 responded with a counterproposal. Gap should not be permitted to use its own failure to
19 cooperate in the meet and confer process to impede the efficient progress of discovery in the
20 Roots litigation. Moreover, Gap fails to acknowledge that discovery in the Roots Action has
21 already commenced. Among other things, as noted above, the parties have collectively
22 exchanged approximately 45,000 pages of documents; Roots has participated in the depositions
23 of two Gap witnesses; and Roots has served its initial disclosures. Moreover, Gap served its
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1 own discovery requests on Roots over two weeks ago.¹ In light of these facts, Gap's suggestion
2 that the discovery notice was premature has no merit.

3 The fact that Gap has not completed document discovery in the Roots Action has
4 no bearing on Roots' ability to notice the deposition of a third-party witness at this time. Fed.
5 R. Civ. P. 26(d) is clear that "methods of discovery may be used in any sequence, and the fact
6 that a party is conducting discovery, whether by deposition or otherwise, does not operate to
7 delay any other party's discovery." Moreover, Mr. El Sokary is a Gabana witness; Gap does not
8 deny that it has had full document discovery from Gabana in the Gabana Action.

9 There is no support in the Federal Rules of Civil Procedure for Gap's assertion
10 that a deposition may not proceed on less than ten days notice. (Gap Mot. at 4.) Rule 30 does
11 not set any such bright line rule, but instead mandates only "reasonable notice" under the
12 circumstances of the case. Fed. R. Civ. P. 30(b)(1). Gap's attempt to invoke Rule 32(a)(3) is
13 similarly unavailing. That Rule provides that a "deposition may not be used against a party
14 who, having received less than 11 days notice of a deposition, has promptly upon receiving such
15 notice filed a motion for a protective order requesting that the deposition not be held or be held
16 at a different time or place." Fed. R. Civ. P. 32(a)(3). The practice commentaries to Rule
17 32(a)(3), however, specifically note that the rule "is not intended to signify that 11 days' notice
18 is the minimum advance notice for all depositions."

19 Even though Gap may argue that it was not informed until September 4 that
20 Roots intended to depose Mr. El Sokary, under the circumstances of this case, Gap was not put
21 in the position of preparing for this deposition on eight days notice. To the contrary, Gap admits
22 that it has been preparing to depose Gabana's witnesses, including Mr. El Sokary, for "nearly a
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24 ¹ Gap now claims that its document requests were filed "early" in light of the pendency of
25 Roots' motion to consolidate the Roots Action with the Gabana Action. (Haney Decl., Ex. 11.)
26 Notably, however, in the weeks since the Court denied the motion to consolidate, Gap never
27 withdrew its document requests as prematurely filed.

year.” (Jackson Decl. ¶ 3.) Gap will depose Mr. El Sokary on September 12, regardless of whether Roots deposes him on that date. Plainly, Gap’s motion for a protective order is not motivated by the interests of convenience. Rather, the motion is calculated to make it difficult for Roots to obtain the testimony of an important witness who is not a party to the Roots Action, and is quite likely outside the subpoena power of a U.S. court. Gap’s transparent attempt to delay this case and impose additional costs on Roots is contrary to the federal deposition-discovery rules, which are “accorded a broad and liberal treatment to effect their purpose of adequately informing litigants in civil trials.” *Herbert v. Lando*, 441 U.S. 153, 176 (1979).

The motion should be denied.

CONCLUSION

For the foregoing reasons, Defendants’ motion for a protective order should be denied.

Respectfully submitted,

_____/s/
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